92-1807

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GLOBAL DIVERS & CONTRACTORS, INC.,

Plaintiff-Petitioner,

vs.

LEEVAC CORPORATION, LEEVAC SHIPYARDS, INC., BOSTON OLD COLONY INSURANCE COMPANY and LLOYDS OF LONDON AND INSTITUTE COMPANIES,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals apply the proper standards in evaluating the award of summary judgment to defendants exculpating them from fire damage to a vessel by interpreting the word "property" in an indemnity provision in a ship repair contract to include the vessel itself based upon application of the parol evidence rule to exclude respondent shipyard's ("Leevac") oral admission in its deposition that "property" did not include the vessel?

2. Did the Court of Appeals err in not addressing the petitioner shipowner's ("Global") argument that on a motion for summary judgment parol evidence should be considered to reform a written ship repair contract where both parties testified on deposition that the written contract does not reflect their true intent?

3. Did the Court of Appeals err in not addressing Global's argument that its pretrial stipulation to forego punitive damages did not estop Global from arguing in opposition to a motion for summary judgment that a Louisiana statute voided an indemnity releasing Leevac from compensatory damages caused by gross fault?

4. Did the Court of Appeals err in affirming summary judgment dismissing Global's claim against Leevac's Ship Repairers Legal Liability insurers whose premiums were paid for by Global as an obligation under the ship repair contract in disregard of genuine issues of material fact in the record?

STATEMENT OF PARTIES AND RELATED PARTIES

The following persons are listed pursuant to Rules 14.1(b) and 29.1 of the Rules of this Court to disclose the parties, corporate parents, and subsidiaries:

1. Global Industries, Ltd., Global Divers & Contractors, Inc., Pipelines, Incorporated, Pipe Lines Unlimited Services, Global Pipelines PLUS, Inc., Pelican Transportation, Inc. and Global Oil & Gas, Inc.

2. Leevac Corporation, Leevac Petroleum, Inc., Leevac Marine, Inc., Leevac Shipyards, Inc., Cari Corporation and Dotco One, Inc.

3. Boston Old Colony Insurance Company, Marine Office of America Corporation, and Continental Insurance Company.

4. The parties subscribing to the Excess/Umbrella Ship Repairer's Legal Liability Policy No. GCM13263, Certain Underwriters at Lloyds, London by and through their designee Bryan Geoffrey Hopwood, Institute of London Underwriters being composed of the following ILU Companies: Yorkshire L A/C; Prudential Trust No. 2 A/C; Hansa Marine UK; Vesta (UK); Cornhill Insurance; Allianz International; Orion T A/C; Skandia UK T A/C; Yasuda Europe; Scottish Lion; Ocean Marine; Sphere Drake; No. 2 A/C; Dai Tokyo (UK); Northern U/W Agency No. 6 A/C; Threadneedle; Insurance Company of North America (UK) Ltd.; Sirius (UK) "L" A/C; Folksam; Commercial Union;

Bishopsgate "M" A/C; Minster No., 3 A/C; Chancellor Insurance Company Limited; and National Employer's Mutual General Insurance Association, Limited.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

NO.

GLOBAL DIVERS & CONTRACTORS, INC.,

Plaintiff-Petitioner

-against-

LEEVAC CORPORATION, LEEVAC SHIPYARDS, INC., BOSTON OLD COLONY INSURANCE COMPANY AND LLOYDS OF LONDON AND INSTITUTE COMPANIES,

Defendants-Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished pursuant to Rule 47.5 of the Rules of the Court of Appeals for the Fifth Circuit. Its affirmance of the judgment of the District Court is referenced at 983 F.2d 1062 (5th Cir.

1993). The Court of Appeals' opinion is printed in the attached Appendix, A1*.

The order of the Court of Appeals filed February 15, 1993, denying a petition for rehearing is printed at Appendix, A6.

The final judgment dated March 19, 1992, dismissed all claims against all defendants based upon a number of unpublished decisions of the District Court incorporated in the judgment. The judgment is printed in the Appendix, A7.

The opinion of the District Court dated February 24, 1992, granting the motions for summary judgment of all defendants dismissing all claims is printed at Appendix, A9.

The opinion of the District Court dated October 11, 1991, denying Global's motion for relief from the Court's August 9, 1991 decision and denying Global's motion to withdraw a stipulation between counsel on punitive damages is printed at Appendix, A19.

The opinion of the District Court dated August 9, 1991, denying Global's motion for reconsideration of the Court's decision of March 14, 1991, is printed at Appendix, A23.

The opinion of the District Court dated March 14, 1991, denying Global's motion to compel discovery of Leevac's attorney and denying Global's motion for partial summary judgment on the issue of liability is printed at Appendix, A30.

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* "A" refers to the designated pages of the Appendix attached to this Petition.

The opinion of the District Court dated March 31, 1989, denying Global's motion for partial summary judgment is printed at Appendix, A37.

JURISDICTION

The decision of the Court of Appeals was filed January 15, 1993. The Court of Appeals order denying rehearing was filed on February 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE RULE AND STATUTES INVOLVED

Rule 56(b), (c) and (e), Federal Rules of Civil Procedure.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Louisiana Civil Code

Art. 1848. Testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or an act under private signature. Nevertheless, in the interest of justice, that evidence may be admitted to prove such circumstances as a vice of consent, or a simulation, or to prove that the written act was modified by a subsequent and valid oral agreement.

Art. 1853. A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.

A judicial confession is indivisible and it may be revoked only on the ground of error of fact.

Art. 1948. Consent may be vitiated by error, fraud, or duress.

Art. 1949. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.

Art. 2004. Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.

Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.

Art. 2045. Interpretation of a contract is the determination of the common intent of the parties.

Art. 2046. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent.

Art. 2050. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.

Art. 3506 (13). There are in law three degrees of faults: the gross, the slight, and the very slight fault.

The gross fault is that which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud.

The slight fault is that want of care which a prudent man usually takes of his business.

The very slight fault is that which is excusable, and for which no responsibility is incurred.

STATEMENT OF THE CASE

Jurisdiction in the District Court was based on admiralty and maritime jurisdiction under 28 U.S.C. § 1333.

Petitioner Global Divers & Contractors, Inc. (referred to as "Global"), plaintiff in the court below, in 1987 purchased a vessel, the M/V Western Narrows. Global intended to convert the vessel into a state of the art diving saturation vessel. The vessel was to have a built-in 1,000 foot saturation diving system, with a centrally located "moonpool" for the deployment and retrieval of a diving bell through the center of the bottom of the vessel's hull, and a four point mooring system to allow the vessel to anchor on sites for long-term saturation diving jobs. These conversion features would have enabled the vessel to conduct undersea exploration work for longer periods, in rougher weather, and with more precision.

In February and March of 1988, Global negotiated with respondent-defendant Leevac Shipyards, Inc. in Jennings, Louisiana (referred to as "Leevac") to have the conversion work performed on the hull of the vessel. Because Global was on a tight schedule, the parties agreed that Global personnel would install diving chambers and systems components on the vessel in the shipyard at the same time that the conversion work on the hull was being performed by Leevac. This meant that Global personnel, equipment, tools, and parts would be on, and in proximity to, the vessel in Leevac's shipyard at the same time Leevac's personnel, equipment, tools and parts were on, and in proximity to, the vessel.

Contract negotiations began between the parties on February 27, 1988. Vice President and Secretary Treasurer of Leevac, Charles Burrell, represented Leevac. Global's Risk Manager, Peter Borne, represented Global. Rosemary Azar, an attorney employed by Global, counseled Borne. James Burke, an attorney who was the regular outside counsel of Leevac, counseled Burrell. On March 1, 1988 representatives of Global and Leevac met to reduce the negotiations to writing in the form of a Master Service Contract (A40) and Work Order. A50. The form of the contract was proposed by Global. The indemnity provision at issue (Section 9B of the Master Service Contract) was proposed by Leevac. Burrell and Borne each executed the Master Service Contract and the Work Order on March 4, 1988.

The Master Service Agreement provided in Sections 9A and B:

> 9.A. CONTRACTOR [Leevac] agrees to release, protect, indemnify, defend and hold COMPANY [Global] harmless from and against all liability, claims, demands and causes of action of every kind and character, including the cost of the defense thereof, for loss of or damage to property of the CONTRACTOR and its invitees, howsoever caused and even though caused by the negligence of the indemnified party, its invitees or anyone for whom they may be acting.
>
> 9.B. COMPANY [Global] agrees to release, protect, indemnify, defend and hold CONTRACTOR harmless from and against all liability, claims, demands and causes of action of every kind and character, including

> cost of the defense thereof, for loss of or damage to property of the COMPANY and its invitees, howsoever caused and even though caused by the negligence of the indemnified party, its invitees or anyone for whom they may be acting.

Section 21B of the Master Service Agreement defined property:

> 21.B. The term "property" as used herein shall mean all property (real or personal), equipment, material or supplies belonging to or leased by a party or its invitees.

The Master Service Contract required Leevac to secure insurance covering workmen's compensation, employers' liability, maritime employers' liability insurance, comprehensive general liability coverage, automobile liability insurance and full form protection and indemnity insurance. The Work Order required that Leevac secure Ship Repairers Legal Liability ("SRLL") insurance, for which Leevac would receive reimbursement from Global in the amount of 1.25% of the total invoice amount for the conversion. Global did pay the premiums on SRLL insurance during the two months the vessel was at Leevac's shipyard. A certificate of insurance issued by Leevac's insurance broker was attached to the Master Service Agreement and the Work Order to evidence Leevac's compliance with the insurance requirements of the contract documents. The only insurance Global itself carried on the vessel was Port Risk Insurance which covered damage to the vessel except that caused by ship repairer's negligence. The District Court characterized the contract documents in its decision of February 24, 1992 as being "awkward at best and uncommonly ill-conceived". The court observed "only

the most strained reading makes some provisions relevant." A11.

The clear and unequivocal deposition testimony of the signing officers of each party (Burrell and Borne) was that the mutual indemnity provisions regarding each party's property damage (which appeared in Sections 9A and 9B of the Master Service Agreement) were not applicable to the vessel itself. Burrell was selected pursuant to Rule 30(b)(6), Federal Rules of Civil Procedure, by Leevac to testify at deposition on behalf of Leevac . Burrell testified:

> Q. I'll get right to the point, Charlie, and look you right in the eye. Was it your intent that the word "property" in 9-B was going to cover that great big vessel?
>
> A. No.

Azar agreed in her deposition. Burke disagreed and claimed in his deposition that property included the vessel. However, Leevac invoked the attorney-client privilege to curtail the deposition of Burke on this key point.

During the afternoon of April 28, 1988, a welder employed by Leevac touched off a fire on board the M/V Western Narrows. As of the date of the fire, Global had not yet begun installation of its diving system. No fire watch was posted by Leevac at the time the blaze broke out. Leevac did not conform to safe shipyard practices and governmental regulations concerning firefighting readiness of a shipyard. Leevac used a one-inch garden hose in an attempt to put out the blaze. The fire quickly became out of control and burned for fourteen hours. Over $2.2 million in damages was caused to Global's vessel.

Leevac and its insurance carriers (defendant-respondents Boston Old Colony Insurance Company and Lloyds of London) contested Global's claim for damages. They argued that the word "property" in the indemnity provision of Section 9B of the Master Service Contract included the vessel itself. Global filed this lawsuit on July 19, 1988 against Leevac and its insurers.

Discovery was completed within the first four months. Global moved for partial summary judgment on the issue of liability and to strike the defense raised by Leevac of the indemnity provision. Global's motion was grounded upon the admission at the deposition of Leevac's representative Burrell that the indemnity provision's reference to "property" was not intended to apply to the vessel. The District Court determined that the "contract" consisted of the Master Service Agreement, the Work Order, and the Insurance Certificate. A33. Pursuant to a choice of law clause in paragraph 13 of the Work Order (A61), the District Court held that Louisiana's rules of contract interpretation applied. A33.

Global's motion for summary judgment was denied on March 31, 1989. A37-39. The District Court reasoned that even though Leevac had admitted that "property" in the indemnity provision did not include the vessel, there were factual issues raised by the affidavit of Burke as to whether "property" was meant to include the vessel.

Trial was set for the summer of 1990. Pre-trial submissions were made on May 15, 1990, setting forth claims by Global against Leevac based on negligence, gross fault, breach of contract, insurance law and statutory violations, and requesting punitive as well as compensatory damages. Defendants moved to strike the punitive damage claim. The motion was denied at a pre-trial conference. Subsequently, the defendants agreed to stipulate that

Leevac's employees were negligent in causing the fire in exchange for Global's agreement to withdraw its request for punitive damages.

Trial was delayed. In October, 1990, the case was transferred from Judge John Shaw to Judge Nauman Scott. Leevac then filed a motion for partial summary judgment seeking to exclude under the parol evidence rule Burrell's testimony that "property" in the indemnity clause did not include the vessel. Global also filed a motion to reconsider the decision on its prior motion for summary judgment, which had been denied based upon the issue of fact raised by the affidavit of Burke that "property" did include the vessel. Global argued that Burke's affidavit should be ignored because Leevac had curtailed deposition discovery of Burke on this key point by invoking the attorney-client privilege.

On March 14, 1991 the District Court granted Leevac's motion precluding admission of Burrell's deposition testimony as parol evidence. A30-36. The District Court determined that from the four corners of the written contract "property" in Section 9B of the Master Service Agreement was "intended" by the parties to include the vessel. The District Court ruled that Leevac's admission by Burrell and the deposition testimony of Borne and Azar who negotiated the contract, attesting that "property" was not meant to include the vessel, could not be considered. The District Court also denied Global's motion for reconsideration and declared moot Global's request to strike Burke's affidavit. The District Court, did, however, consider other parol evidence submitted by defendants concerning the contract negotiations.

Following the March 14, 1991 ruling by the District Court, all defendants moved for summary judgment to dismiss all claims on the argument that the indemnity

released Leevac from any damages, and that the SRLL insurers were also released if Leevac were not liable to Global, because the insurers had insured only the liability of Leevac. Global also filed an additional motion for reconsideration of the Court's March 14, 1991 ruling, pointing out that the District Court had failed to discuss the issue of reformation raised by Global in response to Burrell's corporate admission that "property" in the indemnity provision was not meant to include the vessel. Global also argued that under Louisiana law it was contrary to public policy for an indemnity provision to preclude Global's claim for compensatory damages based on gross fault.

On August 9, 1991, the Court denied Global's motion for reconsideration but amended its reasons for granting Leevac's motion to exclude parol evidence on the meaning of "property", removing reference to parol evidence cited by defendants. A23-29. The Court ruled that Global had waived its claims for compensatory damages due to Leevac's gross fault by withdrawing Global's claim for punitive damages. A24-27.

Global then moved to reinstate its claim for punitive damages. It argued that it had never intended to withdraw its allegation of gross fault in support of its compensatory damages when it withdrew its request for punitive damages. On October 11, 1991 the District Court denied Global's motion to reinstate its claim for punitive damages and refused to consider reformation of the contract on the ground that no parol evidence was admissible when the language of the contract was clear. A19-22.

On February 24, 1992, the District Court granted all of the defendants' motions for summary judgment, dismissing all of Global's claims against Leevac and its insurers. A9-18. Judgment was entered on March 20, 1992,

dismissing all claims pursuant to the District Court's prior decisions. A7-8.

REASONS FOR GRANTING THE WRIT

This Court should review and reverse the decision of the Court of Appeals in the exercise of this Court's power of supervision over the lower federal courts to apply the principles articulated by this Court for interpreting and applying Rule 56 of the Federal Rules of Civil Procedure governing summary judgment. The decisions below did not view the inferences to be drawn from the underlying facts most favorable to Global, the party opposing the motion for summary judgment. This Court countless times has prescribed the basic rule on summary judgment to be that "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); cited with approval in Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).

Here, the underlying facts support an inference that the word "property" in the indemnity clause did not include the vessel itself. It was error for the courts below to deny Global its right to trial on this genuine issue of material fact.

The parol evidence rule was used erroneously by movant Leevac to exclude its own testimony supporting Global's interpretation of the contract. The written contract itself was ambiguous and not in accord with the intention of both parties. Reformation was erroneously rejected as a remedy because the courts below improperly excluded Leevac's admission that the contract meant what Global's witnesses contended it meant.

A. THE DECISIONS BELOW IGNORED THE PRINCIPLE ARTICULATED BY THIS COURT THAT ON A MOTION FOR SUMMARY JUDGMENT ALL INFERENCES MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE PARTY OPPOSING THE MOTION, AND IMPROPERLY EXCLUDED UNDER THE PAROL EVIDENCE RULE THE ORAL ADMISSION OF THE MOVING PARTY THAT THE CONTRACT MEANT WHAT THE DEFENDING PARTY CONTENDED IT MEANT.

Burrell, the executing officer on behalf of Leevac, testified that Leevac did not intend the word "property" in the indemnity provision to include Global's vessel. The testimony by Borne, the executing officer on behalf of Global, was to the same effect. These two executing officers understood that the SRLL insurance policy was to respond to any damage to the vessel by Leevac personnel and that the indemnity provision did not limit the SRLL insurance coverage. The indemnity was for the purpose of exculpating Leevac for damage to Global's equipment that Global was to install on the vessel at the same time Leevac was working on the hull.

On a motion for summary judgment, the parol evidence rule is inapplicable to an admission by the party seeking to enforce the parol evidence rule and obtain summary judgment on the written contract. Kutner Buick, Inc. v. American Motors Corp., 1986 WL 11067 (E.D. Pa. Oct. 2, 1986) (not reported in F. Supp.) (copy of opinion at A70). In Kutner Buick, on a motion for summary judgment by American Motors based upon a written non-exclusive dealership agreement, the court denied summary judgment based upon the deposition testimony of American Motors'

officer admitting his prior oral promise to accommodate Kutner's request that the dealership be exclusive in northeast Philadelphia. The court, applying Pennsylvania law, ruled that there was an exception to the parol evidence rule where the party seeking to enforce the written contract admitted that the writing does not express the entire agreement between the parties. The court said:

> Sworn testimony or pleadings of an enforcing party or disinterested witnesses admitting an incomplete writing satisfies the "clear and convincing" requirement.
>
> . . .
>
> Testimony from AMC officials clearly shows an admission of an oral agreement between Carroll [AMC's officer] and Kutner. AMC's representations cannot be construed as mere explanations of the corporation's marketing plan. As a result, parol evidence of the oral agreement is admissible. Based on the depositions and exhibits, I conclude that the oral agreement is admissible, and therefore, the written contract does not as a matter of law dictate summary judgment for defendants.

A74; 82. Accord La. Civ. Code arts. 1848, 1853, supra.

Even though a clause may appear to be "so clear and plain that no doubt can be raised about its meaning", extrinsic evidence is allowed by the parties to support a different interpretation of a word or phrase that the parties themselves intended to use. Garza v. Marine Transp. Lines, Inc., 861 F.2d 23, 27 n.4 (2d Cir. 1988) (applying "general maritime contract law"). As the court pointed out in Garza, there is "nothing in the law of contracts that prevents the parties from ascribing an uncommon meaning to their

words," and therefore the court should allow the parties to provide evidence on the meaning of phrases to determine whether or not the phrase was unambiguous to the parties themselves when they signed the contract.

Relying on the opinions of this Court, the Court of Appeals in Garza said:

> Although it may appear that the language of some agreements is so clear and plain that no doubt can be raised about its meaning, in fact, extrinsic evidence may support an unusual interpretation in some cases. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425, 38 S. Ct. 158, 159, 62 L. Ed. 372 (1918) (Holmes, J.). For example, in Thorington v. Smith, 75 U.S. (8 Wall.) 1, 12-14, 19 L. Ed. 361 (1868) the Court allowed extrinsic evidence that the word "dollars" did not have its ordinary meaning, "in order that justice be done between the parties." Id. at 14. There is nothing in the law of contracts that prevents the parties from ascribing an uncommon meaning to their words. "No contract should ever be interpreted and enforced with a meaning that neither party gave it." 3 A. Corbin, supra, § 572B, at 198 (Supp. 1971).

861 F.2d at 27 n.4. Accord La. Civ. Code arts. 1848, 1853, 1948, 1949, supra.

The word "property" in Section 9B of the Master Service Contract and in Section 21B cannot be viewed separate and apart from the word "vessel" which is used in various places throughout the contract. The term "vessel" appears in Section 1 of the Master Service Agreement and in Section 8E several times. A41; 43-45. The word "vessel" also appears in the Work Order in places. See Sections 2, 3, 4, 5(2), (4), (6) (8), 7.1, 7.2, 7.3, 7.4, 9 and 14. A54-62. The word "vessel" also appears as a separate insured item in the Certificate of Insurance. A65. Global is entitled to the inference that if "vessel" were meant to be included in the indemnity clause, the word "vessel" would have been used. This was a unique ship repair contract. It was drafted to take account of the circumstance that both parties would be working on the vessel simultaneously and using their own "property" in the course of their work.

The contract required Leevac to obtain SRLL insurance and Global to pay the premium during the work on the vessel (see Section 5(5) of the Work Order (A55) and Section H of the Certificate of Insurance (A66)). SRLL insurance provides coverage to a ship repairer who may be obligated to pay for damage to the vessel "while such watercraft are in the care, custody or control of the insured (ship repairer) for the purposes of repair or alteration at or caused by the insured's employees while working on such vessel or craft." The sole purpose for the SRLL insurance was to provide insurance protection for damage to the vessel caused by the employees of Leevac. By ruling that the indemnity provision released Leevac from any liability for damage caused to the vessel, the courts below rendered meaningless the other contractual requirement that Leevac obtain SRLL insurance to cover its exposure for that damage. This interpretation leads to "absurd consequences", which calls for the admission of parol evidence of the intention of the parties. La. Civ. Code art. 2046, supra. Neither the District Court nor the

Court of Appeals explains the "absurd consequences" resulting from the construction that Global paid for insurance and then released Leevac from liability for damage to the vessel, thereby releasing the insurer whose premium Global paid.

Under Louisiana substantive law, it is clear that if a contract is capable of construction in accordance with justice and fair dealings, the court should adopt such a construction instead of one which results in a loss to a party to the contract. Bonfanti v. Davis, 487 So. 2d 165 (La. App. 3d 1986). In construing a contract, the fact that an informed and experienced person does not usually or customarily bind himself to unjust, unreasonable or meaningless obligations must be considered in interpreting the obligations under the contract. J.H. Jenkins Contractor, Inc. v City of Denham Springs, 216 So. 2d 549 (La. App. 1st Cir. 1968). Borne and Burrell were in agreement as to the meaning of the word "property", and that the indemnity agreement provision did not apply to the vessel undergoing repair. The negotiators took great pains to determine how best to insure the vessel while it was at Leevac's shipyard. Both Burrell and Borne testified that they decided to obtain SRLL insurance to cover the vessel against negligent damage by the shipyard.

The only reason why Global and Leevac would agree that Leevac would carry SRLL insurance and Global would pay the premium was to protect Global's vessel from negligent damage caused by Leevac employees while the vessel was in the shipyard. This obligation is inconsistent with the indemnity found in Section 9B. This creates an ambiguity that requires parol evidence to resolve. See La. Civ. Code art. 2050, supra.

In Ogea v. Loffland Bros. Co., 622 F.2d 186 (5th Cir. 1980) and Klepac v. Champlin Petroleum Co., 842 F.2d

746 (5th Cir. 1988), the parties inserted in a contract both an insurance obligation and an indemnity obligation which appeared to be in conflict with one another. The Court held that it must construe the two provisions together to give meaning to both. The same is true here. Obviously, Leevac and Global during the negotiations contemplated that SRLL insurance was going to respond to Global with respect to any damage Leevac Shipyard employees caused to the vessel. Leevac and Global also agreed that any of the diving equipment and other materials being brought into the yard by Global which Leevac had no involvement with, was going to be the responsibility of Global and not Leevac.

B. ON A MOTION FOR SUMMARY JUDGMENT WHERE BOTH PARTIES AGREE THAT THE WRITTEN CONTRACT DOES NOT REFLECT THEIR TRUE INTENT, PAROL EVIDENCE SHOULD BE CONSIDERED TO REFORM THE WRITTEN CONTRACT TO REFLECT THE PARTIES' INTENT.

Leevac's officer Burrell who signed the contract on behalf of Leevac admitted on his deposition that the word "property" in the indemnity provision of Section 9B of the Master Service Contract did not include the vessel. He further testified that the intention of 9B was to protect Leevac from liability with reference to the equipment that Global was going to be installing in the vessel simultaneously with the conversion work that Leevac was to be doing.

> We were very concerned with the indemnity agreement, that anything that happened was going to end up to be our responsibility. We knew that Global was going to be bringing

> certain prefabricated work in, that they were going to be bringing certain equipment in, that they were going to have certain people working on the boat, possibly even living on the boat at the time, that they were going to be doing their own electrical work. We felt that we had ourselves hanging out for more than we deserved to be on the limb for . . . and that was a particular item that we needed to have changed.

Borne and Azar testified that it was their intent not to release Leevac from liability regarding damage to the vessel by Leevac and to require that Leevac have SRLL insurance to cover that liability.

Therefore, the mutual intent of the parties at the time the contract was entered and before the fire occurred was that the indemnity agreement of Section 9B did not include the vessel. Equitable reformation of a contract due to mutual error in the drafting of the contract and the introduction of parol evidence to establish that error is clearly allowed, both by the Court of Appeals for the Fifth Circuit and Louisiana courts. See Travelers Indem. Co. v. Calvert Fire Ins. Co., 798 F. 2d 826 (5th Cir. 1986), modified, 836 F.2d 850 (5th Cir. 1988); Daigle & Assocs., Inc. v. Coleman, 396 So. 2d 1270 (La. 1981). Parol evidence has always been admissible to prove mutual mistake by the parties in order to reform a contract that does not reflect the true intentions of the parties, even where contractual terms may be unambiguous.

The law of Louisiana is that parol evidence is admissible to reform the unambiguous language of the written instrument to show the actual intent of the parties and to correct mutual mistakes when the instrument does not express the agreement of the parties and there are

allegations of error or mutual mistake. Daigle & Assocs. v. Coleman, supra; Harris v. Baird, 546 So. 2d 497, 500 (La. App. 4th Cir.), cert. denied, 551 So. 2d 1325 (La. 1989); Dugas v. Modular Quarters, Inc., 561 So. 2d 192, 201 (La. App. 3d Cir. 1990), La. Civ. Code art. 1949, supra. Both federal and state courts are uniform on this proposition. Lynal, Inc. v. Patrick Petroleum Co., 593 F. Supp. 1325, 1327 (W.D. La. 1984); Pacific Ins. Co. v. Quarles Drilling Corp., 850 F.2d 1087 (5th Cir. 1988); Travelers Indem. Co. v. Calvert Fire Ins. Co., supra; Green v. SHRM Catering, Inc., 710 F. Supp. 174, 178 (W.D. La. 1987); Harris v. Baird, supra; Bonadona v. Guccione, 362 So. 2d 740 (La. 1978).

The grant of summary judgment is error by the courts below because there are substantial factual issues presented by Global as to error or mistake in the contract. Liam v. Austin Power, Inc., 569 So. 2d 601 (La. App. 2d Cir. 1990); First State Bank & Trust Co. v. Seven Gables, Inc., 501 So. 2d 280 (La. App. 1st Cir. 1986), cert. denied, 502 So. 2d 103 (La. 1987). There is no question that the courts below should have at least found that there was a question of fact whether both Leevac and Global intended the vessel to be within the term "property" in the indemnity provision in Section 9B. Beside Leevac's admission by Burrell, there is evidence that the parties intended that Leevac's fault in damaging the vessel at the shipyard was to be covered by the SRLL insurance. Reformation of the contract should have been ordered.

Global had urged reformation in opposition to Leevac's motion for summary judgment in its briefs filed in March 1989, September 1991, and in its final brief opposing defendants' motion for summary judgment. Reformation was listed as an issue in the pretrial stipulation. Nevertheless, the only reference by the District Court to reformation came in its October 11, 1991 ruling (A19-22), where the court erroneously stated that it could not

consider reformation because "parol evidence is inadmissible when the language of the contract is clear". A22

Defendants below argued that Global had never properly raised the issue of reformation because it was not set forth in the complaint. This argument was raised for the first time in the Court of Appeals. However, the question of reformation was briefed by the parties as far back as 1989. Global obviously did not have to plead reformation in its complaint as a remedy or cause of action, because Global was not basing its claim on a reformed reading of the contract. It was clear to Global that the indemnity paragraph was not applicable to the vessel. When the contractual defense based on defendants' reading of Section 9B was raised by the defendants' answers, reformation was asserted by Global to counter that defense both in its motion for partial summary judgment filed in 1989, and the subsequent pretrial order filed in May of 1990.

There is no requirement in the Federal Rules of Civil Procedure that the plaintiff amend its complaint to counter defenses raised in an answer. Even if it were necessary to raise reformation by way of an amendment to the pleadings, that was accomplished in the pretrial stipulation signed and filed on or about June 5, 1990. The pretrial stipulation set forth reformation as an issue to be decided. The defendants did not object. The pretrial stipulation serves to amend and supplement the pleadings pursuant to Rule 16 of the Federal Rules of Civil Procedure. One of Global's contentions in that pre-trial stipulation was

> If, as defendants have argued, the contractual term "property" does not include the "vessel", the contract should be reformed to comport with the clear intentions of both

> parties to the contract as expressed in the sworn testimony.

C. THE COURT OF APPEALS ERRED IN NOT ADDRESSING GLOBAL'S ARGUMENT THAT ITS STIPULATION TO FOREGO PUNITIVE DAMAGES DID NOT ESTOP GLOBAL FROM ARGUING LEEVAC'S GROSS FAULT IN SUPPORT OF COMPENSATORY DAMAGES

Louisiana Civil Code Article 2004 provides that "any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party."

Global's complaint pleaded in its second cause of action that Leevac's "recklessness" caused the fire. The complaint sought only compensatory damages. Subsequently, in the pre-trial stipulations jointly entered into by the parties on May 15, 1990, Global listed as an issue to be tried gross fault on the part of Leevac, and asserted a claim for punitive damages.

Louisiana Civil Code Article 3506 (13) defines gross fault. It reads:

> There are in law three degrees of faults: the gross, the slight, and the very slight fault.
>
> The gross fault is that which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud.

> The slight fault is that want of care which a prudent man usually takes of his business.
>
> The very slight fault is that which is excusable, and for which no responsibility is incured.

Subsequent to the pre-trial stipulation, Global agreed to withdraw its request for punitive damages in exchange for Leevac's agreement to stipulate to liability for negligence. Global's counsel drafted a stipulation which waived

> any claim for punitive damages and exemplary damages against Leevac Shipyard, Inc., Leevac Corporation and its liability insurers concerning the conduct of Leevac's arising out of the fire and damage to the M/V WESTERN NARROWS.

In its ruling of August 9, 1991, the District Court held that Global's waiver of its request for punitive damages had "relinquished any claim [Global] may have had alleging that Leevac was grossly negligent in causing the fire when it entered into a stipulation absolving Leevac of any such gross fault." A24. On a motion for summary judgment, where all inferences are to be drawn in favor of the party opposing the motion, it was error for the District Court to conclude that an agreement withdrawing a claim for punitive damages withdrew an allegation of recklessness or gross fault contained in a cause of action which did not seek punitive damages. Global relinquished only a remedy; not a theory of fault. Global should have been free to argue that Article 2004 of the Louisiana Civil Code precluded the indemnity in Section 9B of the Master Service Contract

from barring a claim that the fire which destroyed Global's vessel was caused by Leevac's gross fault.

The Court of Appeals ignored this point which had been raised on appeal and on reargument to the Court of Appeals. Again, Global was the victim of the courts below having failed to apply the standards set by this Court on a motion for summary judgment.

D. THE COURT OF APPEALS ERRED IN AFFIRMING DISMISSAL OF GLOBAL'S CLAIMS AGAINST LEEVAC'S SHIP REPAIRERS LIABILITY INSURERS BECAUSE IT HELD THERE WAS NO CLAIM AGAINST LEEVAC

The Court of Appeals held that "[s]ince Leevac is not liable to Global, neither are Leevac's insurers liable to Global." A5.

The rulings below resulted in an absurd construction of the contract documents. That construction led to the result that Global delivered its vessel to Leevac's shipyard, released Leevac from any claim for damage to the vessel, and released the only insurers who could cover damage to the vessel, while at the same time paying the insurers' premium. Louisiana Civil Code Article 2046 provides that "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the partys' intent." Article 2050 provides that "[e]ach provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." The decision below violated these principles when summary judgment was awarded to defendants.

CONCLUSION

This petition for a writ of certiorari should be granted.

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Respectfully submitted,

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